

NO. 84369-4

SUPREME COURT THE STATE OF WASHINGTON

JACK and DELAPHINE FEIL, JOHN and WANDA TONTZ, and
THE RIGHT TO FARM ASSOCIATION OF BAKER FLATS,
Appellants,

v.

THE EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD, et al., (No. 82399-5)

and

DOUGLAS COUNTY; DOUGLAS COUNTY BOARD OF
COUNTY COMMISSIONERS; WASHINGTON STATE
DEPARTMENT OF TRANSPORTATION; WASHINGTON STATE
PARKS AND RECREATION COMMISSION; and PUBLIC UTILITY
DISTRICT NO. 1 OF CHELAN COUNTY, (No. 82400-2)

Respondents.

Consolidated on Appeal

**APPELLANTS' OBJECTIONS TO / MOTION TO STRIKE
RESPONDENT DOUGLAS COUNTY'S RAP 10.8
"STATEMENT OF ADDITIONAL AUTHORITIES"**

*2-23-2011: At the direction of
the assignment judge, the motion
to strike is passed to the
merits.*

*Theresa Carlson
Deputy Clerk*

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1. **Moving Party:** This motion is filed by the Appellants Feil, Tontz, and the Right to Farm Association of Baker Flats.

2. **Relief Requested:** This motion registers Appellants' objections to . . . and asks the Court to strike . . . the January 6, 2011 RAP 10.8 "Statement of Additional Authority" served on Appellants by Respondent Douglas County on January 10, 2011.

3. **Reference to Record:** This motion relies upon the following portions of the record that demonstrate that the briefing filed by the parties does not include issues, authority or argument pertinent to Respondent Douglas County's RAP 10.8 "Statement of Additional Authority:"

- Appellants' March 16, 2009 Opening Appellate Brief;
- Douglas County's April 16, 2009 Responding Appellate Brief;
- Appellants' March 19, 2010 Petition for Review to State Supreme Court;
- Douglas County's April 5, 2010 Answer to Petition For Review;
- Appellants' October 4, 2010 Supplemental Brief [Respondent Douglas County filed no supplemental brief]; and
- Douglas County's January 6, 2011 "Statement of Additional Authorities."

No briefing provided by the Respondent the State of Washington raised a *res judicata* or collateral estoppel argument.

4. **Grounds for Relief / Argument:** The Assignments of Error and issues set out in Appellants' March 16, 2009 Opening Brief, their March 19, 2010 Petition for Review, and their October 4, 2010 Supplemental

Brief **did not** include any issue pertaining to “*res judicata*” or “collateral estoppel.”

RAP 10.3(b) provided Douglas County the opportunity to add issues in its April 16, 2009 Responding Brief, but the County did not identify “*res judicata*” or “collateral estoppel” as issues in the case. Moreover, Douglas County's Responding Brief provided no argument or authority on those matters.

On or about April 5, 2010, Douglas County filed an “Answer to Petition For Review,” but again raised no issues regarding *res judicata* or collateral estoppel. RAP 13.7(d) afforded Douglas County a third opportunity to raise and argue issues and provide authority in a “Supplemental Brief,” but Douglas County chose not to file and serve a RAP 13.7(d) supplemental brief.

Douglas County's January 6, 2011 RAP 10.8 “Statement of Additional Authority” attempts to inject new issues and new arguments:

- (1) that RAP 10.3(b) required the County to include in its Response Brief; and
- (2) that RAP 13.7(a) required it to include in its opposition to the Petition for Review and/or in its Supplemental Brief, if any.

RAP 10.8 does not authorize a party to inject new arguments or new issues under the pretext of providing a statement of “additional authorities,” and thereby circumvent the briefing requirements of the Rules of Appellate Procedure. *Frank v. Fischer*, 46 Wn.App 133, 141, 730 P.2d 70 (1980), *aff'd* 108 Wn.2d 468, 476, 739 P.2d 1149 (1987).

In addition to the above general objections, the following additional specific components of Douglas County's "Statement of Additional Authorities" are objectionable:

- (a) *Feil v. Eastern Washington Growth Management Hearings Board*, 153 Wn.App. 394, is not "additional authority." It was previously cited by Douglas County at pages 5 and 11 of its Answer to Petition for Review for different purposes, and is now cited for the improper purpose of presenting a quotation apparently believed by Douglas County to support new argument;
- (b) The County's "Statement of Additional Authorities" fails to comply with RAP 10.8 because it does not identify the issues in the case for which the new authority is offered; and
- (c) Douglas County's six (6) references to the record do not constitute "additional authority" within the meaning of RAP 10.8. RAP 10.3(a)(6) distinguishes between "legal authority" and "references to relevant parts of the record." RAP 10.8 authorizes a statement of additional *authority*, but does not authorize additional "references to the record," which is but a disguised attempt by Douglas County to insert new arguments in violation of the specific prohibition of RAP 10.8.

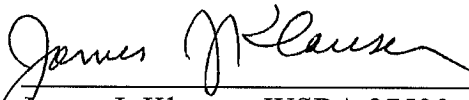
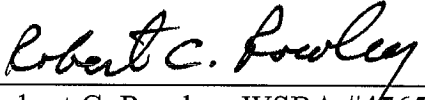
5. **Conclusion:** Douglas County's January 6, 2011 "Statement of Additional Authorities" must be stricken. Douglas County cannot be excused from complying with RAP 10.3, RAP 10.8, and RAP 13.7.

These Appellant Farmers' right to brief the merits of all issues

cannot be so blatantly circumvented.

DATED this 15th day of January 2011.

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